

**Local 334, Laborers' International Union of North America, AFL-CIO (Kvaerner Songer, Inc.) and Arthur C. Stites .** Cases 7-CB-12525 and 7-CB-12667

August 27, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS  
LIEBMAN AND TRUESDALE

On May 1, 2001, Administrative Law Judge William G. Kocol issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this matter to a three-member panel.

The Board has considered the decision and the record in light of the exceptions<sup>1</sup> and briefs and has decided to affirm the judge's rulings, findings,<sup>2</sup> and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Local 334, Laborers' International Union of North America, AFL-CIO, Washington, Pennsylvania, its officers, agents, and representatives, shall take the action set forth in the Order.

CHAIRMAN HURTGEN, concurring.

I concur. However, the case is more difficult (procedurally) than my colleagues suppose it to be. I therefore set forth my separate view.

The complaint alleged that there was an exclusive hiring hall. It further alleged that the Respondent Union refused employee Arthur Stites a referral out of that hall, and that the Respondent Employer therefore did not hire

him. The case against the Respondent Employer was settled and severed.

The complaint also contained an alternative contention. The contention was that, even if the hiring hall was not an exclusive one, the *Respondent Employer* violated the Act by not hiring Stites. However, the complaint did not allege an alternative contention in regard to the Respondent Union. See paragraph 22.

The judge found that there was not an exclusive hiring hall. He nonetheless found, on the alternative theory, a violation by the Respondent Union. In my view, this was clearly contrary to the complaint.

My colleagues rely upon paragraph 14 of the complaint. That paragraph alleges only that the Respondent Union failed to refer Stites, and refused to allow Kvaerner to hire Stites. Paragraph 14 is to be read in the context of antecedent paragraphs 8 and 9, which allege an exclusive hiring hall. As noted paragraph 22 contains an alternative contention. It says that even if there is not an exclusive hiring hall, the Respondent Employer has nonetheless violated the Act. There is no alternative contention as to the Respondent Union.

The judge said that the complaint was "broad enough" to cover the alternative contention, and that the alternative contention was "fairly litigated." For the reasons set forth above, I conclude that the complaint did not cover the alternative contention as to the Respondent Union. And, since the complaint did not cover that contention, i.e., it did not put Respondent Union on notice thereof, it is problematical to say that the issue was fairly litigated.

Notwithstanding the above, the General Counsel, at the close of the hearing, said that he wished to add the alternative contention vis-a-vis the Union. At that point the Respondent could have objected and/or asked for time to defend against the new contention. It did neither. In these circumstances, I would not find a procedural impediment to the finding of a violation.<sup>1</sup>

*Donna Nixon, Esq.*, for the General Counsel.

*J. Douglas Korney, Esq. (Korney & Heldt)*, of Bingham Farms, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Detroit, Michigan, on March 12, 2001. The charges were filed July 31 and December 22, 2000,<sup>1</sup> and an order consolidating cases, consolidated amended complaint, and notice of hearing (complaint) issued on February 12, 2001. The complaint alleges that Local 334, Laborers' International

<sup>1</sup> No exceptions were filed to the judge's finding that the Respondent did not violate Sec. 8(b)(1)(A) and (2) of the Act by refusing to refer applicant Stites for employment through its hiring hall.

<sup>2</sup> We find, in agreement with the judge and contrary to our concurring colleague, that the complaint clearly encompasses the allegation that the Respondent unlawfully refused to allow the Employer to hire applicant Stites. Par. 14 of the amended complaint alleges:

Since about August 1, 2000, Respondent Local 334 has failed and refused to refer the Charging Party as a laborer to Respondent Kvaerner at the Zug Island jobsite because he was not a member of Respondent Local 334 and has refused to allow Respondent Kvaerner to hire the Charging Party. (emphasis added)

This paragraph specifically and clearly alleges that the Respondent refused to allow the Employer to hire Stites. Par. 20 of the complaint alleges, inter alia, that by this conduct the Respondent violated Sec. 8(b)(2) of the Act. In addition, as noted by the judge, although the Respondent was expressly notified at the close of the hearing that the General Counsel intended to pursue this allegation, it neither objected nor requested time to present additional evidence.

<sup>1</sup> The fact that the General Counsel did so suggests that he was aware that the complaint itself did not contain the alternative contention as to the Respondent Union.

<sup>1</sup> All dates are in 2000 unless otherwise indicated.

Union of North America, AFL–CIO (Respondent) violated Section 8(b)(1)(A) and (2) by operating an exclusive hiring hall and refusing to refer Arthur C. Stites for employment to Kvaerner Songer, Inc. (the Employer) because Stites was not a member of Respondent and by refusing to allow the Employer to hire Stites. The complaint also alleges that Respondent violated Section 8(b)(1)(A) by refusing to process a grievance that Stites sought to file concerning the Employer’s failure to hire him.<sup>2</sup> Respondent filed a timely answer that, as amended at the hearing, admitted the allegations in the complaint concerning the filing and service of the charge, jurisdiction, labor organization status, and agency status. Respondent denied that it operated an exclusive hiring hall and that it violated the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

## FINDINGS OF FACT

### I. JURISDICTION

The Employer, a corporation, is a general contractor with an office and place of business in Washington, Pennsylvania, where it annually performs services valued in excess of \$50,000 for enterprises located outside the State of Pennsylvania. Respondent admits and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent also admits and I find that it is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### *A. Background*

The Employer has performed work on a blast furnace as a general contractor for another employer on Zug Island in the city of River Rouge near Detroit, Michigan. The parties stipulated that the Employer and the Laborers’ International Union of North America, AFL–CIO are parties to a collective-bargaining agreement that covers the work performed by certain employees on the Employer’s Zug Island jobsite and that Respondent is a duly chartered Local and agent of the Laborers International and represents the unit employees working on the Zug Island jobsite. Article IV of the applicable contract provides:

1. (a) Beyond the Employer’s regular employees, including laid off, laid-off and collecting unemployment and/or transferring from another project of the same employer, the Employer agrees to give the local union in the area an opportunity to supply any additional employees.

....

2. When requested, the Union agrees to furnish competent workers upon notification to the Business Manager or Business Agent of the Union and further, the Employer agrees that beyond his regular employees he will give the

<sup>2</sup> The complaint also alleged that the Employer had violated Sec. 8(a)(3) and (1) by refusing to hire Stites. Those allegations were settled and I granted the General Counsel’s unopposed motion to sever those allegations from the complaint.

Local Union in the area an opportunity to supply any additional employees. The Employer retains his right of freedom of selection of employees from among all applicants.

#### *B. The Zug Island Project*

Work on the project began in May and ended in December. The Employer hired Alonzo Rogers as day-shift general foreman and Edward Deladurantaye as night-shift foreman. Alonzo began hiring laborers in about May. The parties stipulated that the Employer hired a total of 245 unit employees at the Zug Island jobsite. The Employer brought 7 of these employees with it from out of state and that “the remaining 238 were members of” Respondent.<sup>3</sup>

Records show that 18 persons, including the foremen, were employed in May. The Employer started a second shift in June. At that time Alonzo and Deladurantaye made a list of people who they had worked with in the past and Deladurantaye then used that list and hired the people who were available. An exception to this procedure was the union steward Philip Jackson; Respondent sent him to the Employer. Records show that 35 persons were employed during June. Thereafter Deladurantaye continued to hire employees whom he had worked with in the past or who were recommended by others. Prospective employees also appeared at the jobsite on a daily basis. When in need, Deladurantaye hired from among those persons. In July and August, Deladurantaye also used Respondent’s hiring hall to obtain some employees. Records show that Respondent made about 29 dispatches from its hiring hall in July and about 32 in August. The employee complement reached its peak in the second week of August; about 80–90 employees were hired in July. Records show that about 138 persons were employed on the project during July and 166 in August. By September and October the Employer was laying off employees as the project began to wind down.

#### *C. Stites Applies for Work*

Arthur Stites has worked as a laborer and pipefitter since 1977. Since January 2000, Stites has been a member of another Laborers Local, Local 1191. On July 12, Stites applied for work with the Employer at the Zug Island jobsite. Stites entered the trailer used by the Employer and spoke with Respondent’s steward, Phillip Jackson. Jackson has a desk in the trailer. Stites introduced himself and asked Jackson to introduce him to the foreman. Jackson asked if Stites was a laborer, and Stites replied that he was a Detroit laborer with Local 1191. Jackson replied with words to the effect that they did not use people from Local 1191 on that site. After Stites protested the matter, he again asked to see the foreman. This time Jackson directed Stites to the back of the trailer where Stites then spoke with Edward Deladurantaye, the Employer’s night-shift general foreman. Stites introduced himself and outlined his qualifica-

<sup>3</sup> Respondent contends in its brief that the stipulation means only that the 238 employees “either were or became members of” Respondent. The stipulation is not a model of clarity on this point. However, I need not resolve this issue because even assuming the stipulation means that all the 238 employees were members of Respondent before they were hired, I nonetheless conclude below that the General Counsel has failed to establish the existence of an exclusive hiring hall.

tions. Deladurantaye said that the Employer was not hiring at that time. Stites asked if he could come back again to see if work was available and Deladurantaye said that he could do so. Stites gave his telephone number and left. Stites visited the jobsite three or four times thereafter and Deladurantaye told him that there were no openings or that he had not “gotten” to Stites yet.

On July 29 Stites again visited the site and spoke with Jackson and Deladurantaye. Stites said that he was looking for work. Deladurantaye replied that he was not able to hire Stites because Stites was a member of Local 1191. Deladurantaye said that Stites would have to talk to Respondent’s field representative and dispatch Agent Scott Covington. Stites said that he would not talk to Covington, that it was against the rules, and that he planned to make a complaint. Jackson then said that he was not going to let Deladurantaye hire Stites and lose his (Jackson’s) job. Stites asserted that it was not Jackson’s job to interfere with whom Deladurantaye hired. Jackson described an incident when he had applied for work with an employer in Local 1191’s jurisdiction but was not hired. Stites answered that that employer should have hired Jackson. Stites told Deladurantaye that he would return and that he would file a complaint. He said that he would talk with Covington and ask Covington to call Deladurantaye and confirm that Deladurantaye had the authority to hire him.

On about August 1 Stites called Covington. Stites said that he had been to the Employer’s trailer looking for work but that Jackson and Deladurantaye told him that that they were not going to hire him because he was a member of Local 1191 and that they had to get permission from Covington before they hired him. Covington replied that the Employer could hire anyone “they damn well pleased.” Stites asked whether Covington would call Deladurantaye and make sure that Deladurantaye understood this. Stites then spoke with Deladurantaye and related the conversation he had with Covington. Stites still was not hired.

On August 7 Stites again talked with Covington; this time the conversation occurred in Covington’s office. Stites asked whether Covington could represent him because he wanted to file a grievance against the Employer and Respondent. Covington replied that he had never heard of an employee filing a grievance against a union. After Stites said that there was a first time for everything Covington said that he would look into the matter. Covington said that the matter would have to be dealt with by another representative. Covington then called the other representative in Stites’ presence. After the telephone Covington said that he would like to go off the record; he said that there never had been any Local 1191 members working on the Zug Island jobsite as laborers. Stites related another incident where he felt he was denied employment because he was not a member of Respondent. After some further conversation Stites left. Covington did not file a grievance on Stites’ behalf.

### III. ANALYSIS

#### A. Credibility

The facts concerning the Employer’s general hiring practices are based on Deladurantaye’s uncontested and credible testimony. However, the facts concerning Stites’ efforts to secure

employment with the Employer are based on Stites’ testimony. Based on my observation of his demeanor as a witness I am convinced that he made a sincere effort to give accurate testimony. I have considered Deladurantaye’s testimony concerning those events. Unlike his testimony concerning the Employer’s general hiring procedures, his testimony concerning the interactions with Stites was palpably more hesitant and less credible, especially in response to questions that I asked. Other uncontested facts also serve to undermine Deladurantaye’s testimony in this regard. For example, he admitted that hiring reached its peak in the second week of August. Yet when Stites applied for work several times in mid-July through early August Deladurantaye claimed that there were no positions available. Also, some of Deladurantaye’s testimony was given in response to leading questions. I further note that Respondent recommended Deladurantaye for the position he held with the Employer.

I have also considered Covington’s testimony. I found it to be unpersuasive. Finally, I have considered Jackson’s testimony. It seems clear that Jackson’s testimony was only a partial description of the conversations that occurred with Stites. Based on that and the relative demeanor of the witnesses, I do not credit Jackson’s testimony to the extent that it is inconsistent with Stites’.

#### B. Exclusive Hiring Hall Issue

A union that operates an exclusive hiring hall arrangement may not discriminate among employees in the manner that it refers employees for employment. However, a union that operates a nonexclusive hiring hall owes no such obligation. *Teamsters Local 460 (Superior Asphalt)*, 300 NLRB 461 (1990). The existence of an exclusive hiring hall arrangement may be shown by express contractual provisions or by practice. *Teamsters Local 174 (Totem Beverage)*, 236 NLRB 690 (1976). The General Counsel bears the burden of establishing the existence of an exclusive hiring hall arrangement. *Carpenters Local 537 (E. I. du Pont)*, 303 NLRB 419, 429 (1991). The essence of such an arrangement is that an employer and a union agree that the union will be the sole source of referral of applicants for employment with an employer. That is, the employer gives up its right to hire employees from any source except the union.

I turn first to address whether the General Counsel has established the existence of an exclusive hiring referral arrangement by contract. The contract provisions set forth above provide only that Respondent is given an opportunity to supply additional employees. It does not provide that Respondent will be the sole source of applicants or that the Employer must accept all qualified referrals. To the contrary, the contract provides that the Employer retains the right to hire from among all applicants. These contract provisions fall short of establishing an exclusive hiring referral system. *E.I. du Pont*, supra. *Boston Cements Masons Union No. 534 (Duron Maguire Eastern Corp.)*, 235 NLRB 826 (1978), cited by the General Counsel is, in my view, inapposite. There the General Counsel did not challenge the lawfulness of the hiring referral system; the Board placed the burden on the General Counsel to establish that the hiring arrangement was not a lawful exclusive hiring arrangement. In this case the it is clear that the General Coun-

sel bears the burden of establishing an exclusive hiring arrangement and I have concluded that it has failed to do so.

I next address whether the General Counsel has established the existence of such an arrangement by the practice of the parties. The facts described above clearly show that the Employer did not rely on Respondent as the sole source of hiring referrals. Indeed, Respondent only referred a small fraction of employees for employment. The Employer was free to, and did, hire employees who walked in from the street and who were referred to it by other employees. The fact that the overwhelming number of employees may have been members of Respondent may be evidence of an unlawful closed-shop arrangement, but it does not show the existence of an exclusive hiring referral arrangement. *Laborers Local 394 (Building Contractors Assn.)*, 247 NLRB 97 (1980), cited by the General Counsel, is not to the contrary. There the exceptions to the exclusiveness of the hiring arrangements involved sons and nephews hired on a part-time basis for short duration. That is very much unlike the situation here.

I conclude that the General Counsel has failed to establish the existence of an exclusive hiring hall arrangement. I shall dismiss those allegations in the complaint. It follows from this finding that the allegation concerning Respondent's refusal to process Stites' grievance also must be dismissed because that allegation is premised on the existence of an exclusive hiring arrangement.

#### C. Independent 8(b)(2) Issue

The General Counsel argues in the alternative that even if he failed to establish the existence of an exclusive hiring hall arrangement Respondent nonetheless violated the Act by causing the Employer to fail to hire Stites in violation of Section 8(b)(2). That section makes it an unfair labor practice for a labor organization to cause or attempt to cause an employer to discriminate against an employee in violation of Section 8(a)(3). In determining whether that provision has been violated, there is no requirement that a union threaten or coerce an employer into failing to hire an employee; it need only successfully request that an employer do so. *Carpenters Local 1456 (Underpinning Constructors)*, 306 NLRB 492 (1992).

I have described above how on July 29 Jackson told Stites that he was not going to allow the Employer to hire Stites. In context, it is clear that Jackson was refusing to do so because Stites was not a member of Respondent. Deladurantaye heard this remark and failed to hire Stites despite the fact that Deladurantaye conceded that Stites was qualified and despite the fact that the Employer in fact was hiring. Under these circumstances I conclude that Respondent violated Section 8(b)(2) by causing the Employer to fail to hire Stites because Stites was not a member of Respondent.<sup>4</sup>

<sup>4</sup> I conclude that this issue was fairly litigated. The complaint is broad enough to cover this issue. The facts underlying this issue were fully developed in the record. Importantly, at the close of the hearing, in response to my question, the General Counsel expressly notified Respondent that he intended to make this argument. Respondent neither objected nor requested to present additional evidence.

#### CONCLUSION OF LAW

By causing Kvaerner Songer, Inc. to refuse to hire Arthur C. Stites because he was not a member of Respondent, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(2) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent engaged in the unlawful conduct described above it must make Stites whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>5</sup>

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>6</sup>

#### ORDER

Respondent, Local 334, Laborers' International Union of North America, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Causing or attempting to cause Kvaerner Songer, Inc. or any other employer to refuse to hire or otherwise discriminate against Arthur C. Stites in violation of Section 8(a)(3) of the Act.

(b) In any like or related manner violating Section 8(b)(2) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Arthur C. Stites whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Within 14 days after service by the Region, post at its union office and hiring hall copies of the attached notice marked "Appendix."<sup>7</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60

<sup>5</sup> No reinstatement is at issue in this case because it is clear that the project has ended and that Stites would have been hired only for that project.

<sup>6</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>7</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by Kvaerner Songer, Inc, if willing at all places where notices to employees are customarily posted.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT cause or attempt to cause Kvaerner Songer, Inc. or any other employer to refuse to hire or otherwise discriminate against Arthur C. Stites because he is not a member of our union and in violation of Section 8(a)(3) of the Act.

WE WILL NOT in any like or related manner violate Section 8(b)(2) of the Act.

WE WILL make Arthur C. Stites whole for any loss of earnings and other benefit, he suffered as result of the discrimination against him, less any net interim earnings, plus interest.

LOCAL 334, LABORERS'  
INTERNATIONAL UNION OF NORTH  
AMERICA, AFL-CIO